Docket No.: 4590-219 **PATENT**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of	:	
Hubert CARON	:	
New U.S. Patent Application	:	Group Art Unit: n/a
Filed: herewith	:	Examiner: n/a

For: VERTICAL FIELD OF REGARD MECHANISM FOR DRIVER'S VISION ENHANCER

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In accordance with the provisions of 37 C.F.R. 1.56, 1.97, and 1.98, the attention of the Patent and Trademark Office is hereby directed to the discussion below concerning the present invention described in the above-identified application. It is respectfully requested that the discussion be expressly considered during the prosecution of this application.

Based on the present facts and legal precedent below, the present invention was neither: a) known or used by others in this country before the invention thereof by the applicant, nor b) described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the filing date of the application for patent.

THE FACTS

Applicant is filing a patent application concurrent with the instant disclosure statement. The application includes claims to a vision system having a variable field of regard. The facts, as described below and supported by the attached Declaration of Mr. Marc-André Jean, indicate that the claimed system of the present invention was not known or used by others in this country prior to invention thereof by the applicant nor described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the instant filing date.

The present invention applies to driver vision enhancing systems of a type typically used in military vehicles. More particularly, a system according to an embodiment of the present invention is constructed to be mounted inside a sensor assembly mechanism of a vehicle in order to enable a user to vertically move a sensor within a field of regard of a lens assembly of the vision enhancing system. Other approaches to adjusting the elevation of a sensor module include U.S. Patent 6,563,102 to Wrobel for a "Mounting and Control System for Optical Imaging Systems."

The present invention simplifies and improves the design of variable field of regard driver vision enhancing systems and methods of controlling such systems. The system includes a housing, a movable sensor assembly located within the housing, a radiation detector connected to one end of the sensor assembly, and an actuator connected to the housing and able to contact the sensor assembly to move the sensor assembly in the housing and thereby move the radiation detector. The method includes moving a radiation detector as part of a driver vision enhancing system in a vertical direction within an image plane of the driver vision enhancing system.

By February of 2002, a prototype system according to the present invention was built and being tested by the inventor. The prototype system was incorporated into a demonstration unit used to display a driver vision enhancing system manufactured and sold by the present assignee of the instant application. The prototype system fully enclosed the mechanism of the present invention and persons viewing the prototype system were unable to view the mechanism of the present invention.

The demonstration unit was displayed at several demonstrations by marketing personnel. The marketing personnel were all employed or supervised by the present Assignee and constantly controlling access to the demonstration unit. At each demonstration unit display, the demonstration unit was mounted on a table or on a tripod so as to allow the observers to look at the video image generated by the demonstration unit and to access the control knobs on the display module. However, no observer was invited or allowed to touch or otherwise actuate the mechanism of the prototype system. The demonstration unit was used to demonstrate the picture quality of the infra-red sensor used in the demonstration unit. The prototype system within the demonstration unit was not described or commented during display of the demonstration unit.

The date and location of the demonstrations are detailed in Table 1 below:

Table 1

Date	Demonstration
26 February 02	Association of the United States Army (AUSA) Winter Symposium Fort Lauderdale, FL USA
16 June 02	Eurosatory Paris, France
8 August 02	68TH Association of Public Safety Communications Officials (APCO) Annual Conference & Exposition Nashville, TN, USA
10 April 03	Canada's defence and security technology showcase (CANSEC) Ottawa, Canada
6 May 03	Force Protection Equipment Demonstration (FPED) Quantico, Virginia USA
4 October 03	AUSA Washington, DC USA

The prototype system was never offered for sale or sold during any display of the demonstration unit at the demonstrations listed in Table 1. The demonstrations were for the presentation of picture quality of the sensor to observers and were not directed to the mechanism of the present invention as embodied in the prototype unit. No offers for sale were ever provided nor were any acceptance received. No printed publications depicting or describing the prototype system or another embodiment according to the present invention have been distributed to persons not covered by a non-disclosure agreement with the present Assignee.

THE LAW

The pertinent portion of 35 U.S.C. Sections 102(a) and 102(b) provide that a person shall be entitled to a patent unless:

"(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States"

With respect to the meaning of known or used by others, "known or used by others means knowledge or use which is accessible to the public." Carella v. Starlight Archery, 231 USPQ 644, 646 (Fed. Cir. 1986). See also In re Borst, 145 USPQ 554, 556 (CCPA 1965)(it is well "settled law [t]hat knowledge contemplated by 102(a) must be accessible to the public"). In the Borst case, the CCPA (today the Federal Circuit), clarified the criterion for the meaning of "knowledge" in 102(a) requiring a "disclosure sufficient to enable one skilled in the art to reduce the disclosed invention to practice. Id at 557. "The mere fact that a disclosure is contained in a patent . . . or found in a printed publication does not make the disclosure itself any more meaningful to those skilled in the art." Id.

In other words, subject matter which may be actually known by others but not disclosed in sufficient fashion to enable those skilled in the art to practice the invention is not legal knowledge under Section 102(a). The patent system rewards those who file promptly for patent by granting a limited monopoly in exchange for bringing the invention to the public for commercialization and post patent use by all, thereby increasing the general knowledge of society. Conversely, if an invention is "known" to others within the legal meaning of Section 102(a) prior to the date of a patentee's invention, "the later inventor has not contributed to the store of knowledge and has no entitlement to a patent." Woodland Trust v. Flowertree Nursery Inc., 47 USPQ 2d 1363, 1365 (Fed. Cir. 1998).

With respect to the on-sale bar, "the product must be the subject of a commercial offer for sale" and be ready for patenting in order for the on-sale bar to apply. Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 48 U.S.P.Q.2d 1641 at 1647 (1998). The Federal Circuit clarified this standard in Group One, Limited v. Hallmark Cards, 254 F.3d 1041, 59 USPQ2d 1121 (Fed. Cir. 2001). In Group One, the Federal Circuit held that "only an offer which rises to the level of a commercial offer for sale, one which the other party could make into a binding contract by simple acceptance (assuming consideration), constitutes an offer for sale under § 102(b)." Id. at 1048, 59 USPQ2d at 1126. See also Lacks Industries, Inc. v. McKechnie Vehicle Components USA, Inc., 322 F.3d 1335 at 1347 (Fed. Cir. 2003). The appeals court referred to the Uniform Commercial Code (UCC), for a definition of whether "a communication or series of communications rises to the level of a commercial offer for sale." Group One at 1047.

Further still, promotional activity not rising to the level of a contractual offer for sale cannot trigger the on-sale bar. Linear Technology Corp. v. Micrel, Inc., 275 F.3d 1040, 61 U.S.P.Q.2d 1225 (Fed. Cir. 2001). The appeals court continued with reference to the UCC, "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 [*1308] (1981); accord Richard A. Lord, Williston on Contracts § 4:13, at 367 (4th ed. 1990). Group One at 1050.

THE PRESENT CASE

Applying the law to the present case, the facts demonstrate that the present invention was not known or used by others in this country before the invention thereof and the invention was not described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the filing date of the application.

Specifically, as described above, the present invention, though included in a displayed demonstration unit, was never displayed outside of the demonstration unit and was never operated such that it would be in public use even while enclosed in the demonstration unit. That is, the prototype system was never made accessible to the public: the prototype system was never disclosed in sufficient fashion to enable persons skilled in the art to practice the invention.

Further specifically, as described above, there were no commercial offers for sale of the prototype system. There were no offers rising to the level of a commercial offer for sale, no offers which a party could make into a binding contract by acceptance. There was no promotional activity related to the prototype system to even consider whether such activity rose to the level of a contractual offer for sale to trigger the on-sale bar. The promotional activity involved related to the demonstration of the quality of the infra-red sensor of the demonstration unit and not the operation of the prototype system enclosed within the demonstration unit.

CONCLUSION

Based on the foregoing, there has been no disclosure or offer for sale of the present invention during the demonstrations identified in Table 1 meeting the level required for a rejection of the claimed invention under 35 U.S.C. 102(a) or 35 U.S.C. 102(b).